

*United States Court of Appeals
for the Second Circuit*



APPENDIX

74-2370

In the United States
Court of Appeals for the Second Circuit

No. 74-2370

BPK

GERARD and GEMMA BRAULT

v.

TOWN OF MILTON

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT
OF VERMONT

APPENDIX

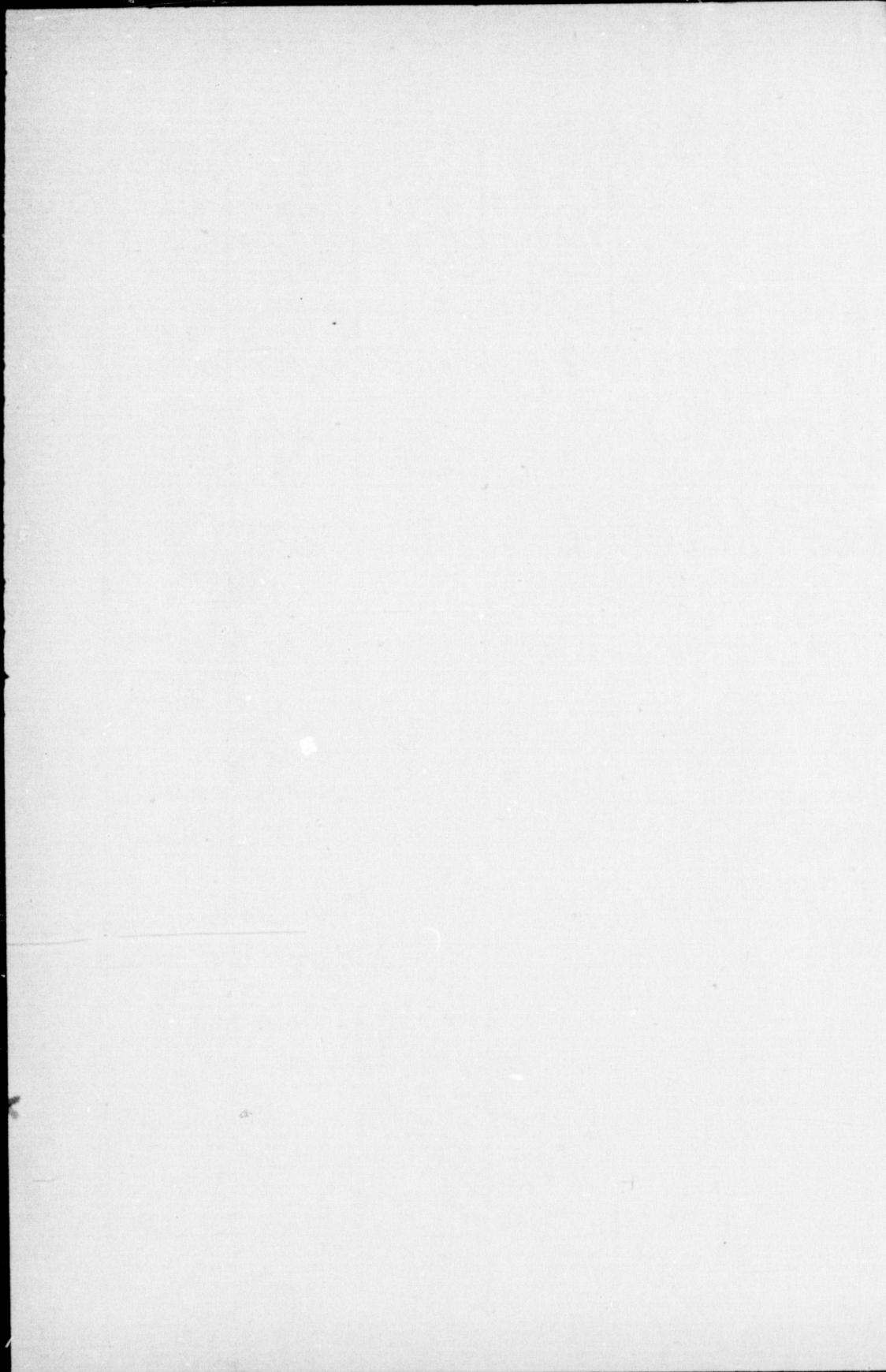
John A. Burgess, Esquire
John A. Burgess Associates, Ltd.
Post Office Box 766
Montpelier, Vermont 05602
Counsel for Appellants



PAGINATION AS IN ORIGINAL COPY

INDEX

	<u>Page</u>
Docket Entries	1
Complaint	2
Motion to Dismiss Complaint	4
Order	5
Notice of Appeal	6



**DOCKET ENTRIES
PROCEEDINGS**

DATE
1974

August 22 Filed Complaint

August 22 Issued Summons and delivered same to Marshal for Service

August 26 Filed Summons returned, served

September 03 Filed Defendant's Motion to Dismiss Complaint

October 08 Filed Order—Defendant's Motion to Dismiss Plaintiff's Complaint is granted and Plaintiff's Complaint is hereby dismissed. Mailed copy to attorneys

October 15 Filed Plaintiff's Notice of Appeal

**UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT**

GERARD and GEMMA BRAULT }
v. } CIVIL ACTION
TOWN OF MILTON } Docket No. 74-214

C O M P L A I N T

Jurisdiction

1. This is an action for damages under 42 U. S. C. §1983 and this Court is vested with jurisdiction pursuant to 28 U. S. C. §1331, the amount in controversy being in excess of \$10,000.00 and the controversy arising under the Constitution and laws of the United States;

Parties

2. The Plaintiffs are husband and wife and reside in the Town of Colchester in the State of Vermont and are citizens residents of the United States;

3. The Defendant Town is a municipal corporation of the State of Vermont in the County of Chittenden.

Facts

4. At all material times the Plaintiffs have owned lands in the Defendant Town on which they had commenced to operate a mobile home park;

5. On or about May 8, 1967, the Defendant Town commenced a civil action in the Chittenden County Court of the State of Vermont and herein obtained a permanent and temporary injunction prohibiting the operation by Plaintiffs of their said mobile home park.

6. Said injunctions and the zoning ordinance on which they were based, were subsequently declared void by the Vermont Supreme Court on June 1, 1971.

7. The Chittenden County Court, on remand, and after hearing, awarded damages to Plaintiffs in the amount of \$86,411.00 for loss of business profits occasioned by said injunction;

8. Upon appeal the Vermont Supreme Court, determined the Defendant Town to be immune from payment of damages under State law;

9. The acts of Defendant Town were at all material times under color of State law and as that term is used in 42 U. S. C. §1983;

10. The acts of Defendant Town in obtaining and maintaining the injunction is referred to under a zoning ordinance that they knew, or should have known, to be invalid, deprived Plaintiffs of the use, enjoyment, profits and value of property without due process of law in contravention of the 14th Amendment of the Constitution of the United States;

WHEREFORE Plaintiffs pray:

1. That the Honorable Court will take jurisdiction hereof:

2. That the Honorable Court will declare the rights of the parties in the premises;

3. That the Honorable Court will award to Plaintiffs damages in the amount of \$86,411.00 together with just interest and costs;

4. That the Honorable Court will grant Plaintiffs such other and further relief as the Honorable Court deems meet and just:

Done at Montpelier, Vermont this 21st day of August,
1974.

JOHN A. BURGESS ASSOCIATES, LTD.
By: John A. Burgess, For the Firm
Attorney for the Plaintiffs
P. O. Box 766
Montpelier, Vermont 05602

MOTION TO DISMISS COMPLAINT

COMES NOW the Defendant and for its motion to dismiss Plaintiff's complaint states:

1. The judgment heretofore entered in the case styled **Town of Milton v. Gerard and Gemma Brault**, Chittenden County Court Chancery Docket No. 225, Vermont Supreme Court Docket No. 45-73, is res judicata as to the issues and claim alleged by Plaintiffs in this cause of action and Plaintiffs, are, therefore, barred and estopped to assert the claim made in this cause of action.
2. Plaintiffs have failed to state a claim against Defendant upon which relief can be granted inasmuch as
 - a) Defendant Town of Milton is not a person within the meaning of 42 U. S. C., Section 1983, for the purposes of affording monetary damages;
 - b) The use of the judicial process by Defendant did not violate any right granted under the Fourteenth Amendment of the U. S. Constitution or Section 1983;
 - c) Defendant, in pursuing the case cited in paragraph 1 supra, was acting in a prosecutorial or quasi-prosecutorial role, and is therefore immune from such liability as is alleged;
 - d) The enactment and non-discriminatory enforcement and implementation of a zoning ordinance by Defendant was fully within the sphere of legitimate legislative

activity thereby rendering the Town immune from civil liability for any actions taken prior to the ordinance having been rendered nugatory.

e) Plaintiff fails to allege a claim of wrongful initiation of civil proceedings sufficient to impose liability on Defendant were it a private person, 42 U. S. C., Section 1983 and the Fourteenth Amendment only prohibits the state or one acting under color of its authority from such acts as would be tortious if carried out privately.

f) Plaintiff fails to assert a cause of action independent of 42 U. S. C., Section 1983.

g) Defendant as a governmental entity retains immunity from civil liability.

DONE at Burlington, Vermont, this 30th day of August, 1974.

TOWN OF MILTON

By: Matthew I. Katz

Latham, Eastman, Schweyer & Tatzlaff, its attorneys.

CERTIFICATE OF SERVICE

I, Matthew I. Katz, a member of the firm of Latham, Eastman, Schweyer & Tetzlaff, hereby certify that I have served a copy of the foregoing instrument by mailing the same, first-class mail, postage prepaid to John A. Burgess, Esq., P. O. Box 766, Montpelier, Vermont 05602 this 30th day of August, 1974.

Matthew I. Katz

ORDER

Defendant's motion to dismiss plaintiffs' complaint is granted and plaintiffs' complaint is not a person within the meaning of 42 U. S. C. §1983 and the action may not

be maintained for that reason. **Monroe v. Pape**, 365 U. S. 167 (1961).

Dated at Burlington in the District of Vermont, this 8th day of October, 1974.

Albert W. Coffrin,
District Judge

NOTICE OF APPEAL

COME NOW the Plaintiffs, Gerard and Gemma Brault, by their attorneys, John A. Burgess Associates, Ltd., and hereby appeal to the United States Cour of Appeals for the Second Circuit from the Order dismissing Plaintiffs' complaint for failure to state a claim upon which relief can be granted entered in this action on the 8th day of October, 1974, by the United States District Court for the Districe of Vermon.

Done at Montpelier, Vermont this 14th day of October, 1974.

GERARD and GEMMA BRAULT
By: JOHN A. BURGESS ASSOCIATES, LTD.
John A. Burgess, For the Firm
Their Attorneys

